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In the Supreme Court of the United States

October Term, 1967

No. 672

VINCENT CHIODO, ETHEL CHIODO, L. J. CUMMINGS, RUSS WALDRON, LAREE M. CHIODO, GENE A. CHIODO, AMOS P. HANSEN, H. V. PECK, DON CHIODO, ERNEST G. EARL, RAYMOND HANSEN, WILLIAM PETERSON, MARY ANN NELSON AND LOUISE HIGGINBOTHAM,

Petitioners,

vs.

GENERAL WATERWORKS CORPORATION, a corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the 10th Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent files this brief in opposition to the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the 10th Circuit affirming the judgment of the United States District Court for the District of Utah.

CITATION OF OPINION BELOW

The opinion of the United States Court of Appeals for the 10th Circuit is reported at 380 F. 2d 860.

JURISDICTION

Respondent agrees that petitioners invoke this Court's jurisdiction under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

Respondent contends that, as clearly appears from the opinion of the United States Court of Appeals for the 10th Circuit, petitioners have misstated the questions presented.

1. Since the Court of Appeals did not reach the first of the questions presented by petitioners and did not pronounce either of the "rules" set forth in questions numbered 2 and 3 submitted by petitioners, it is submitted that none of the first three questions is before this Court. The only questions before this Court are:

1. Whether the Court of Appeals erred (a) in holding that the petitioners did not comply with Rule 51 of the Federal Rules of Civil Procedure in failing properly to object to the trial court's instructions and special interrogatories to the jury, and (b) in concluding that such failure precluded petitioners from raising before the Court of Appeals any question about the sufficiency of the trial court's instructions or the method used by the trial court to submit the case to the jury under Rule 49(a) of the Federal Rules of Civil Procedure.

2. Whether the Court of Appeals erred in ruling that the statute of limitations barred petitioners' right to recover. [Petitioners made no claim of infringement of any constitutional rights in the Court below and the issue is not properly before this Court.]

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to those set forth by petitioners, the following are involved:

Rule 49 — Special Verdicts and Interrogatories.

(a) Special Verdicts. The Court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Rule 51 — Instructions to Jury: Objection.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Section 78-12-26, Utah Code Annotated, 1953.

Within three years. — Within three years:

(1) . . .

(2) . . .

(3) An action for relief on the ground of fraud or mistake, but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

STATEMENT OF THE CASE

Since the decision of the Court of Appeals was based on petitioners' failure to comply with Rules 49 and 51 of the Federal Rules of Civil Procedure and its finding that the claims of petitioners were barred by the applicable state statute of limitations, an outline of both the procedural and substantive facts is necessary to understand the present posture of this case.

Petitioners' statement of the case (Petition, pp. 5-8) and its "Statement of Background Facts" (Appendix pp. A-17 to A-29) no more accurately state the facts of this case than do their "Questions Presented" state the issues. One could spend pages noting the erroneous statements, many of which relate to immaterial items, or commenting on the unwarranted characterization of other bits of evidence or on the speculations of counsel framed as if they were conclusions of the court and jury. But since the issues raised by this petition are primarily matters of law, a fairly succinct statement of the material facts is submitted so this Court may properly appraise the rulings of the Court of Appeals in light of the record facts.

SUBSTANTIVE FACTS

Vincent Chiodo, the principal plaintiff, acquired the controlling interest of Bear River in 1943 for $8.50 per share (R. 957). As a small rural telephone company, it provided a good living to him[1] and members of his family[2] who were employed by it in various capacities. Of the other plaintiffs, Russell Waldron was the president and a director and Amos B. Hansen and L. J. Cummings were directors of Bear River.

Beginning in 1957 Thiokol, a large manufacturing concern, began operating a rocket fuel plant in the Bear River service area, which until then had been characterized by relatively constant growth and improvement of facilities typical of a predominantly rural area (R. 1278). The coming of Thiokol changed this placid atmosphere to a sky rocketing demand by Thiokol and its influx of employees for additional telephone facilities with a commensurate overwhelming pressure on Bear River for rapid expansion which severely taxes its financial and technical resources (R. 1279, 1742, 1743). In fact, Chiodo testified that in 1958 he had concluded that the giant Bell Telephone System, his next door neighbor, was ready to grab the Thiokol business if he should "stub his toe" (R. 1283). To meet these problems of financing which the traditional Rural Electrification Administration resources were too slow to provide, and in preference to forcing his shareholders and himself to put up additional capital to meet the Thiokol expansion demands, Chiodo in the fall of 1958 (R. 2371, Ex. A, R. 1282, 1283) turned to Alan Kander & Company of Washington, D. C., which specialized in buying and

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[1]Chiodo served as general manager and director from the time he acquired the company in 1943 until he was discharged in December, 1963 (R. 957).

[2]His wife Ethel was vice president and director, his sons Don and Gene and daughter Mary Ann Nelson were regular employees and his daughter-in-law LaRee was secretary of Bear River (R. 957).

selling telephone companies. Chiodo requested Kander & Company to find him a prospective buyer with the financial resources and technical know-how which would meet the Thiokol requirements.

In September, 1959, Kander's specialist, James I. Lobred, produced an offer of Independent Telephone Company for $200,000 in Independent Telephone Company stock for Bear River (R. 2373-2375, Ex. J). In October of that year, Chiodo wrote Lobred:

> "My attorney, Mr. Calvin L. Rampton, has made an investigation of ITC and he has made the following recommendation:
>
> > "1. That it would not be advisable for me to make a deal with ITC at this time due to the fact that ITC is not in a position nor will it be in a position to pay a dividend for some time to come" (R. 2377, Ex. M).

Later that fall Lobred visited Tremonton, Utah, the headquarters of Bear River and looked over its facilities, books and records and suggested to Chiodo an asking price of $250,000 for the company (R. 1507). At that time Chiodo made clear to Lobred that the price was Lobred's responsibility (R. 1509), and that Chiodo was "leaving it up to him" (R. 1511).

In January, 1960, Chiodo wrote Lobred:

> "Actually what I would like to do is take stock in trade for my ownership in the Bear River Tel. Co. Preferably the stock of a Company that is paying dividens [sic]. We are expanding so fast that we are unable to borrow money fast enough from REA to get ahead enough to pay regular dividens [sic]. We are building up equity at a very good pace, but I am getting to the point after 16 years of hard work to be looking for a little cash out of the business.

> "Along with the stock trade I would prefer an organization that has a full staff of techinicians [sic] including an engineering group to take some of the load" (R. 2379, Ex. S).

Following these directions, in February 1960, Lobred approached General Waterworks (R. 1968, 1969, Ex. 1) which expressed some interest. Chiodo was advised of that interest but that A. W. Sanders, the person in charge of its telephone operations, could not be available to look into the matter until some time in April when he had completed other acquisitions then in progress (R. 2382, Ex. X). Accordingly, a meeting was arranged by Lobred to be held in Chicago on May 4, 1960, in the office of Helmer Hansen, an attorney for General Waterworks. Just before that meeting Chiodo and his wife again met with Lobred, at which time Mrs. Chiodo told Lobred that they "wanted him to set the best price" (R. 1305).

Present at this meeting were Mr. and Mrs. Chiodo, Lobred, Helmer Hansen and A. W. Sanders[1] (R. 1306). Hansen's notes prepared during the meeting (R. 2384, 2385, Ex. B-1) indicated that Chiodo made known his desire for an employment contract, that Chiodo had declined a previous offer of $200,000 in stock from a new company, that Chiodo wanted information with respect to officers of General Waterworks and Sanders, that the attorney for Bear River was Calvin L. Rampton, a Salt Lake lawyer, formerly counsel for the Public Service Commission. The meeting ended with the agreement that Hansen was to prepare an offer to submit to Chiodo for his consideration.

Subsequently, Hansen and Sanders sent Chiodo detailed information relating to General Waterworks and its personnel

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[1]A. W. Sanders died in the spring of 1963, so the nature of his participation came from testimony of plaintiffs' witnesses and contemporaneous memoranda and letters.

(R. 2387-2394, Exs. D-1 to H-1 and R. 1972, Ex. 4 and 5) which Chiodo turned over to Rampton; and Lobred obtained and sent to Chiodo information on quoted prices for various issues of General Waterworks' stock (R. 2402, 2403, Ex. N-1). On May 27 and 28, Sanders personally inspected the Bear River plant and under date of June 3, 1960, wrote to General Waterworks at its Philadelphia headquarters suggesting that an offer of $250,000 be made to Chiodo (R. 1978, 1979, 1980, Ex. 6). On June 3, 1960, Chiodo wrote to Hansen:

> "Mr. A. W. Sanders and Mr. Dirks from the Telephone Division in New London spent May 27th looking over our property. It would appear to me that there is a good possibility of our getting together on some sort of deal.
>
> "I would like to leave any decision on this matter, set for a few months while Mr. Calvin L. Rampton our attorney makes a more thorough investigation. During this period I will not consider any other offers" (R. 1981, Ex. 7).

Later, in the early part of June, Howard Butcher, the President of General Waterworks called Chiodo on the telephone and agreed to Chiodo's terms of $250,000 and an employment contract. To eliminate federal income tax to the sellers, it was agreed they would receive General Waterworks stock in exchange for their Bear River stock.

There were no further negotiations with respect to the purchase price (R. 1511-1513) except for a change in the exchange ratio of General Waterworks stock from 2.5 shares for 1 share of Bear River to 2.7 shares for each share of Bear River so as to reflect the market price of General Waterworks stock as reported to Chiodo by Lobred (R. 2402, 2403, Ex. N-1).

Chiodo made no independent investigation as to whether $250,000 was a reasonable price for Bear River as he left that matter up to Alan Kander & Company (R. 1511).

Shortly after his conversation with Butcher, Chiodo made arrangements with his minority stockholders that in the event the sale was concluded, he would receive, in addition to his pro rata share of the purchase price, 50 per cent of the amount received by the minority shareholders over book value after deducting Lobred's commission of 5 per cent, or a total of $13 per share (R. 2404, Ex. O-1, R. 1502, 1503), which Chiodo took in the form of additional stock when the transaction was closed (R. 1503).

Negotiations from June on concerned the terms of the employment contract for Chiodo to act as manager of Bear River for ten years at $12,000 per year. The salary and the term were not in controversy, but Chiodo was concerned with the scope of his authority as manager and sought some guaranty that his freedom of action would be preserved. Not satisfied with correspondence from Sanders on the subject, Chiodo arranged for a conversation between them to be held at Logan, Utah. A transcript of this conversation was prepared by a court reporter (R. 2011-2057, Ex. 20). Chiodo subsequently submitted a proposed contract which incorporated this transcript by reference as a part of the employment agreement. This proposal was rejected by General Waterworks, and the matter was resolved by a telegram from General Waterworks to Chiodo reading:

> "Copy of verbatim report dated August 3, 1960, of conversation between Vincent Chiodo, A. W. Sanders and Eugene A. Chiodo, held in Logan, Utah is in my possession. The original of said report may be initialed by A. W. Sanders as evidence of the conversation had with you" (R. 2084, Ex. 37, Nov. 8).

and a letter reciting:

> "This letter is written to confirm our understanding with you that in the event that such exchange transaction is consummated, and our nominees are then elected to the board of directors of Bear River Telephone Company, we will then cause Bear River Telephone Company to enter into an employment agreement with you, for a period of ten years, such agreement to be in the form attached hereto with such changes therein as may be agreed to" (R. 2083, Ex. 36, Nov. 4).

Chiodo then reported to Lobred that General Waterworks "has agreed to our offer" (R. 2428, Ex. T-2). The transaction was closed in December, 1960, after the exchange contract (R. 2094, Ex. 43) had been approved by the Public Service Commission of Utah (R. 2437, Ex. E-3). Under date of January 3, 1961 (R. 2103, 2104, Ex. 49), General Waterworks caused Bear River to execute an employment contract with Chiodo to act as its general manager for ten years at $12,000 per year (R. 2103-2104, Ex. 49).

In December of 1963, Chiodo was discharged as manager of Bear River. He immediately commenced suit, with Rampton as his attorney, against Bear River for breach of contract and recovered judgment for the present value of his ten-year contract. See *Chiodo* v. *General Waterworks,* 17 Utah 2d 425, 413 P. 2d 891 (1966).

Over two years earlier, in July, 1961 (R. 1452) Vincent Chiodo and his son Don met with Messrs. Sanders and Bell of General Waterworks in Denver and were told at that time of the possibility of a trade of the Bear River property to Mountain States Telephone & Telegraph Company in which event Vincent Chiodo was through as manager (R. 1454). In August 1961, shortly after that conference (R. 1553), Chiodo

started selling his General Waterworks stock (R. 963) and wrote (R. 1552) a letter to the REA (Supp. Record, R. 7, Ex. B-4(a)).

In that letter dated August 4, 1961, Chiodo stated:

> "Mr. Sanders apparently has been in contact with A. T. & T. Company since the beginning of negotiations for his acquiring the common stock of Bear River Telephone Company from me on December 21, 1960.
>
> "I want to assure you that this action comes as a complete surprise to me as well as our employees. All steps leading up to the acquisition were taken on the basis that General Waterworks would operate this property. I personally was assured that that would be the case. *The price therefore was agreed at about a year's increase added to the surplus as of December* 21.
>
> "I am certain that Mr. Sanders entered into this agreement knowing that he was transferring the property to M. S. T. & T. Co. At that time he seemed very sincere in wanting to operate the property himself.
>
> "It is clear that I have been used. * * *" [Emphasis supplied.]

This action was filed on October 2, 1964, over three years later, which the Court found barred the action under the applicable Utah three year statute of limitations (Sec. 78-12-26(3) Utah Code Annotated 1953).

PROCEDURAL FACTS

This action, seeking damages for alleged violation of S. E. C. Rule 10b-5 (17 C. F. R. 240 10b-5) was originally instituted against General Waterworks, Alan Kander and James I. Lobred. Service was had under the extraterritorial provisions of section 15 U. S. C. 78aa. On February 15, 1965, an

amended complaint was filed against the same three defendants seeking alternatively rescission or damages as against General Waterworks and damages against Lobred and Kander.

On March 9, 1965, the trial court denied plaintiffs' motion for an injunction *pendente lite* seeking to restrain General Waterworks from disposing of the stock of Bear River to Continental Independent Telephone Company pursuant to the terms of a contract entered between them on October 19, 1964 (R. 2150-2154, Ex. 131). No appeal from this order was taken by petitioners pursuant to 18 U. S. C. 1293(a).

On April 1, 1965, the trial court struck all claims for rescission as to General Waterworks and granted a motion for summary judgment in favor of Kander. Subsequently, Lobred was dismissed on stipulation. On August 3, 1965, a second amended complaint was filed naming General Waterworks as the sole defendant and seeking damages only. Jury trial commenced on May 23, 1966, before the Honorable A. Sherman Christensen, United States District Judge.

At the close of plaintiffs' case (R. 1772) and when both parties had rested (R. 1812), defendant moved for a directed verdict on the grounds (1) the claims of plaintiffs were barred by the statute of limitations, and (2) plaintiffs had failed to meet their burden of proof as to fraud, false statements, reliance, causation and damages.[1] The trial court faced the question of "overall scheme" as contended by petitioners by ruling:

1. That there had been no misrepresentation as to the value of General Waterworks stock as it was always worth as much or more than the agreed basis of trade.

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[1]While not reaching these issues, the Court of Appeals questioned "the sufficiency of proof to make a case", 380 F. 2d 860, 863.

2. That the question of Chiodo's reliance on an employment agreement was eliminated because Chiodo did receive such a contract in 1960 and had recovered and collected a judgment of over $80,000 for its breach when he was discharged in 1963.

3. That any other representations which petitioners claimed were made could be considered by the jury in determining General Waterworks' good faith in its representations as to the value of Bear River.

4. That the questions of whether General Waterworks made false representations to petitioners as to the value of Bear River and whether petitioners relied on such representations would be submitted to the jury on special interrogatories.

Subject to these rulings, the trial court held respondent's motion for a directed verdict under advisement and did not rule until judgment was entered for respondent on its motion for entry of judgment on the jury's answers to the interrogatories and the issues of law raised by defendant's motion for a directed verdict (R. 1158).

Prior to submission of the matter to the jury, the Court and counsel met in chambers and discussed informally their respective requested instructions. Counsel then agreed on the record to the following stipulation:

> "THE COURT: Now, on the record, we have been meeting in chambers with counsel, and I have advised counsel with reference to my rulings upon their requests. We have thereafter discussed special interrogatories; and my understanding is that without waiving contentions that have been made throughout the trial or foreclosing counsel in any way from taking exceptions to instructions, except as may be expressly agreed upon here, the parties have agreed that this case may

be submitted to the jury upon appropriate special interrogatories, the form of which has been discussed and agreed upon, subject to express exception which may be taken prior to the retirement of the jury to the jury room, it being agreed by the parties that upon the basis of the responses of the jury to the special interrogatories so submitted, the Court may enter judgment on the verdict; and if it is by the Court determined that there are subsidiary supplementary, or other factual problems necessary to the entry of judgment the resolution of which is necessary in order to enter judgment upon the verdict, the parties agree that as fact finder the Court may determine the other factual problems the resolution of which may be so necessary.

"* * *

"It is also agreed that (and this may be implicit in the foregoing stipulation) the issue of the statute of limitations may be resolved by the Court following the return of the special interrogatories.

"While the parties generally feel that this involves solely or primarily an issue of law in view of the record, yet the parties understand and agree that the Court as fact finder may resolve any factual problems necessary to the resolution of the issue of the statute of limitations" (R. 1863, 1864).

After summation by counsel, the Court instructed the jury generally and then, pursuant to Rule 49(a) Federal Rules of Civil Procedure, submitted six special interrogatories for answer; the last two to be answered only if affirmative answers were given to interrogatories numbers 1, 3 and 4. The interrogatories first questioned by petitioners in the Court of Appeals read as follows:

"3. Do you find by a preponderance of the evidence that the plaintiff Vincent Chiodo relied upon the said misrepresentation as to value to such an extent that such misrepresentation operated as a substantial

inducement for him to agree to sell said stock to the defendant?

"Answer yes or no.

"4. Do you find by a preponderance of the evidence that the following other plaintiffs relied upon said misrepresentation, either as made to them by the defendant or as communicated by Vincent Chiodo to them, to such an extent that it operated as a substantial inducement in the sale of their stock? [Then was listed the names of each plaintiff.]" (R. 1141).

Counsel for petitioners at the bench then objected to the Court's failure to instruct that there may be several proximate causes (R. 1945) and to the use of the word "primarily" in the instruction on reliance (R. 1946). Neither of counsel's exceptions went to the issue first raised by petitioners in the Court of Appeals that a 10b-5 plaintiff need prove neither reliance nor causation.

Counsel for petitioners then stated that the form of interrogatory number 3 was "all right" (R. 1948, 1949), made no other comment or objection to the interrogatories and made no demand under Rule 49 for additional interrogatories on any issue. In response to a query from the Court, counsel for petitioners then stated:

> "We have no exceptions * * * except as noted at the bench" (R. 1954).

The jury answered interrogatory number 1 "yes," found the 1960 value of Bear River to be "$300,000," and answered "no" to interrogatory number 3 and all parts of number 4 (R. 1963, 1964). No answer was returned to interrogatories 5 and 6.

On June 20, 1966, judgment for defendant (Respondent here) was entered by the Court on the answers to the inter-

rogatories and the reserved issues of law (R. 1160). No post-verdict or post-judgment motions were made by petitioners.

On appeal the United States Court of Appeals for the 10th Circuit affirmed the judgment below on two grounds:

1. Petitioners had not complied with Rule 51, Federal Rules of Civil Procedure, stating:

> "We have painstakingly reviewed and considered the record before us on the sufficiency of appellants' objections to the court's instructions and they do not meet the requirements laid down by this court in the long line of decisions cited above. In a footnote we have set out verbatim the pertinent part of the colloquy between the court and counsel as shown by the record which occurred after the instructions here in question were given and prior to the time the jury retired to deliberate.
>
> "This determination precludes appellants from raising here any question about the sufficiency of the court's instructions or the method used by the court to submit the case under Rule 49(a), Federal Rules of Civil Procedure. We are precluded from considering appellants' first two points" (380 F. 2d 860, 864).

2. Petitioners' claims were barred by the applicable state statute of limitations, stating:

> "We consider the judgment as rendered, to have sustained General Waterworks' contention as to the statute of limitations and agree with that disposition" (380 F. 2d 860, 868).

The Court of Appeals also affirmed the trial court's action in striking the count for rescission on two grounds (a) failure to join an indispensible party, and (b) election of remedies. Apparently, the rulings on rescission are not encompassed within the questions asserted in the petition for certiorari. No motion for a rehearing in the Court of Appeals was filed by petitioners.

REASONS FOR NOT GRANTING THE WRIT

1. This case has no significance in the development of the federal securities law because the decision of the Court of Appeals is based solely on two grounds (1) that petitioners failed to comply with Rules 49 and 51 of the Federal Rules of Civil Procedure, and (2) that petitioners' claims were barred by the applicable state statute of limitations.

2. The decision of the Court of Appeals that the record clearly shows petitioners' failure to comply with Rule 51 is in accord with a long line of decisions from that court and from other courts of appeal.

3. The Court of Appeals, in its ruling on the statute of limitations, applied a recent decision of this Court (*International Union* v. *Hoosier Cardinal Corporation*, 383 U. S. 696 (1966)) in selecting the applicable state statute of limitations and followed the interpretation of that statute by the Utah courts. Its choice of the appropriate state statute of limitations is in accord with decisions of other courts of appeal as applied to section 10b-5 actions. Petitioners cannot complain of the procedure followed as they stipulated to it.

4. The decision of the trial court (which was not reached by the Court of Appeals) that a section 10b-5 plaintiff must prove reliance and causation is in accord with decisions from other courts of appeal and in conflict with none. *Rogen* v. *Ilikon Corp.*, 361 F. 2d 260 (1st Cir. 1966); *Janigan* v. *Taylor*, 344 F. 2d 781 (1st Cir. 1965), *cert. denied* 382 U. S. 879; *List* v. *Fashion Park, Inc.*, 340 F. 2d 457 (2nd Cir. 1965), *cert. denied sub. nom. List* v. *Lerner*, 381 U. S. 908 (1965); *Kohler* v. *Kohler Co.*, 319 F. 2d 634 (7th Cir. 1963).

5. The grounds for granting a writ of certiorari asserted by petitioners fail to comply with Rule 19 of this Court in that:

(a) Petitioner has shown no conflict with decisions of other courts of appeal.

(b) Petitioner has shown no conflict with decisions of this Court.

(c) Petitioner has shown no important question of federal law which has not been and which should be determined by this Court.

(d) The decision of the Court of Appeals on the application of Rule 51 of the Federal Rules of Civil Procedure and the appropriate state statute of limitations is in accord with a long line of precedents from this Court and other courts of appeal and followed the state's interpretation of its own statute.

(e) Despite petitioners' gross misrepresentations of both the record below and the nature of the appellate decision, this is just a case where petitioners lost a jury verdict and failed in their appellate attack on the trial court's instructions.

ARGUMENT

THE BASES FOR GRANTING CERTIORARI ASSERTED BY PETITIONERS DO NOT MEET THE CRITERIA OF RULE 19.

The main thrust of petitioners' argument in support of its petition is a claim that the trial court and the Court of Appeals for the 10th Circuit did not follow two decisions of that same Court of Appeals, *Stevens* v. *Vowell*, 343 F. 2d 374 (10th Cir. 1965) and *Woodward* v. *Wright*, 266 F. 2d 108 (10th Cir. 1959). An asserted conflict between two decisions from the same Court of Appeals is not one of the grounds for an exercise by this Court of its certiorari jurisdiction as set forth in Rule 19.

In addition, there are two readily apparent answers to petitioners' claim:

1. The Court of Appeals did not reach the issues on which petitioners' reliance on *Stevens* v. *Vowell, supra,* and *Woodward* v. *Wright, supra,* is based. Instead it ruled that petitioners failed in the trial court to note adequate exceptions to the trial court's view of the applicable law as set forth in its instructions to the jury as required by Rule 51 of the Federal Rules of Civil Procedure and that such failure precluded consideration of petitioners' contentions by the appellate court.

2. The author of the opinion of the Court Appeals in the case at bar was Judge Hill. He was also the author of the opinion of the court in *Stevens* v. *Vowell, supra.* Chief Judge Murrah, who joined in the unanimous decision of the Court of Appeals in the case at bar was the author of the opinion of the Court of Appeals in *Woodward* v. *Wright, supra,* and was one of the panel in *Stevens* v. *Vowell, supra.* If either of those judges, with personal knowledge of what petitioners claimed were the controlling cases, had believed the trial court's view of the law to be erroneous in light of those cases, the "clear error" rule on which petitioner here relies would have prompted reversal, not affirmance, by those same judges.

This points up the whole difficulty in petitioners' presentation to this Court. What petitioners ask this Court to review are not issues of law on which the Court of Appeals has ruled, but issues which exist only in petitioners' imagination.

This Court decides questions of public importance in the context of meaningful litigation. *Monrosa* v. *Carbon Black Export, Inc.,* 359 U. S. 999 (1959). It does not concern itself with issues as to which the Court of Appeals has not passed,

particularly where, as here, the issues which petitioners claim this petition raises are not in the case.

A. *The first question presented by petitioners was not reached by the Court of Appeals, was correctly decided by the trial court and there is no conflict among the circuits on the question.*

The Court of Appeals did not pass on the question of the obligation of a 10b-5 plaintiff to prove reliance and causation. Furthermore, the trial court's view of the law as to this issue was in accord with decisions of the Court of Appeals for the first circuit, *Rogen* v. *Ilikon Corp.*, *supra* at 17; *Janigan* v. *Taylor*, *supra* at 17; the second circuit, *List* v. *Fashion Park*, *supra* at 17; *Ross* v. *Licht*, 263 F. Supp. 395 (S. D. N. Y. 1967); the seventh circuit, *Kohler* v. *Kohler Co.*, 319 F. 2d 634 (7th Cir. 1963); as well as the tenth circuit, *Estate Counseling Service, Inc.* v. *Merrill, Lynch, Pierce, Etc.*, 303 F. 2d 527 (10th Cir. 1962).

Neither in *Stevens* v. *Vowell*, *supra* at 18, nor in the case at bar did the Court of Appeals for the 10th Circuit reach the issue of either reliance or causation. *Stevens* v. *Vowell*, *supra*, dealt only with jurisdiction, and as the issue of reliance and causation had been found in favor of the plaintiff and against the defendant by the trial court, no issue with respect thereto was raised at the appellate level. In the case at bar the Court of Appeals merely found that petitioners failed to comply with Rule 49 and 51 despite the trial court's express invitations to them to do so.

Whether petitioners' agreement at the trial to the procedure adopted by the court in its instructions and the form of interrogatories was motivated by a desire to get their case to the jury at any price or by supreme confidence that the

jury would answer the court's interrogatories favorably to petitioners is now immaterial. The point is that petitioners expressly stipulated to the procedure (R. 1863, 1864), expressly approved the form of the interrogatory (R. 1954) on which they lost and wholly failed to request any additional interrogatories to cover any additional issues of fact they thought to be important. The holding of the Court of Appeals is merely that the petitioners' failure to comply with the clear requirements of Rules 49 and 51 precluded petitioners from raising these issues at the appellate level.

B. *The second question presented by petitioners is not in this case as no such rule was pronounced by the Court of Appeals in the case at bar.*

The Court of Appeals did *not* hold that misrepresentations in connection with the purchase of securities are not actionable under Rule 10b-5 when made by an "outsider" to an "insider" such as are petitioners.

In discussing the statute of limitations, the second ground on which it based its decision, the Court of Appeals reviewed the facts as to whether Chiodo had the opportunity to have full knowledge of the true value of Bear River stock or had knowledge of such facts concerning the alleged fraud as would put a person of ordinary intelligence and prudence on inquiry. *Horn* v. *Daniel*, 315 F. 2d 471 (10th Cir. 1962); *Gibson* v. *Jensen*, 48 Utah 244, 158 Pac. 426 (1916); *Larsen* v. *Utah Loan & Trust Co.*, 23 Utah 449, 65 Pac. 208 (1901). The Court of Appeals concluded its review of all the evidence, including the fact that Chiodo was an insider and that General Waterworks was an outsider, with the statement:

> "In any event, Chiodo had the opportunity to have full knowledge of the true value of Bear River stock and was in the best of positions for more than

> three years prior to the bringing of this suit to ascertain whether any statements made to him by another about Bear River were false" (380 F. 2d 860, 867).

and further noted that:

> ". . . on August 4, 1961 [Chiodo] wrote a letter which plainly shows that he had knowledge of sufficient facts concerning the alleged acts of fraud to put him or any other person of ordinary intelligence and prudence on inquiry" (380 F. 2d 860, 868).

Thus, the Court of Appeals considered the insider seller-outsider buyer relationship only in the context of the statute of limitations. As to whether an insider-seller may complain of misrepresentation as to the value of his own company by an outsider-buyer, the trial court ruled in favor of petitioners in submitting the case to the jury. The jury, in its answers to interrogatories #3 and #4 found that the insider [petitioners] did not rely on any such representation in selling Bear River to General Waterworks.

C. *The third question presented by petitioners is not in this case as no such rule was pronounced by the Court of Appeals in the case at bar.*

The Court of Appeals did *not* pronounce a rule that purchase by fraud of securities is not actionable under Rule 10b-5 when the purchase involves substantially all the voting stock of a going private business concern.

While the Court of Appeals indicated it had "grave doubts as to the applicability of section 10b-5" in light of "all of the facts concerning the transaction" in the case at bar, it concluded:

> "However, we will not pursue this reasoning because there are other clear reasons why appellants cannot prevail."

It went on to conclude that under Rule 51 that:

> ". . . in making such objections the party objecting must state 'distinctly the matter to which he objects and the grounds of his objection.'
>
> "We have painstakingly reviewed and considered the record before us on the sufficiency of appellants' objections to the court's instructions and they do not meet the requirements laid down by this court in the long line of decisions cited above.
>
> "This determination precludes appellants from raising here any question about the sufficiency of this court's instructions or of the method used by the court to submit the case under Rule 49(a), Federal Rules of Civil Procedure. We are precluded from considering appellants' first two points [the same points as are covered by number 1 of the questions presented by the petition]" (380 F. 2d 860, 864).

Thus, the first three of the five questions presented by this petition were not even reached by the Court of Appeals and only the first was even touched on by the trial court.

D. *The Court of Appeals correctly applied Rule* 51 *in accordance with a long line of decisions from this Court and other courts of appeal.*

The Court of Appeals correctly decided that petitioners had failed to comply with Rules 49 and 51 of the Federal Rules of Civil Procedure. It pointed out that it had written "many times" covering its interpretation of the clear mandate of Rule 51 and cited the following cases which hold that in making objections to the court's instructions to the jury the party must state "distinctly the matter to which he objects and the grounds of his objections": *Western Transmission Corp.* v. *Colorado Mainline, Inc.*, 376 F. 2d 470 (10th Cir. 1967); *Pool* v. *Leone*, 374 F. 2d 961 (10th Cir. 1967); *Hardware Mutual Insurance Co.* v. *Lukken*, 372 F. 2d 8 (10th Cir. 1967); *Dunn*

v. *St. Louis-San Francisco Ry.*, 370 F. 2d 681 (10th Cir. 1966); *Peter Kiewit Sons Co.* v. *Clayton*, 366 F. 2d 551 (10th Cir. 1966); *Locke* v. *Atchison, Topeka and Santa Fe Ry.*, 309 F. 2d 811 (10th Cir. 1962); *Darter* v. *Greiner*, 301 F. 2d 772 (10th Cir. 1962); *Miller* v. *Brazel*, 300 F. 2d 283 (10th Cir. 1962); *Union Carbide and Carbon Corp.* v. *Nisley*, 300 F. 2d 561 (10th Cir. 1962); *Pridgin* v. *Wilkinson*, 296 F. 2d 74 (10th Cir. 1961); *Federated Mutual Implement & Hardware Insurance Co.* v. *Fairfax Equipment Co.*, 261 F. 2d 207 (10th Cir. 1958); *Pittman* v. *Harvey*, 261 F. 2d 44 (10th Cir. 1958); *Franklin* v. *Shelton*, 250 F. 2d 92 (10th Cir. 1957), *cert. denied*, 355 U. S. 959; *Western Machinery Co.* v. *Consolidated Uranium Mines*, 247 F. 2d 685 (10th Cir. 1957); *Hayes* v. *United States*, 238 F. 2d 318 (10th Cir. 1956), *cert. denied*, 353 U. S. 983; *Garden City Co.* v. *Bentrup*, 228 F. 2d 334 (10th Cir. 1955); *Solorio* v. *Atchison, Topeka and Santa Fe Ry.*, 224 F. 2d 544 (10th Cir. 1955); *Jones* v. *KOMA, Inc.*, 218 F. 2d 530 (10th Cir. 1955); *Chicago, Rock Island & Pacific Ry.* v. *Kifer*, 216 F. 2d 753 (10th Cir. 1954), *cert. denied*, 348 U. S. 917.

This long-standing rule of the 10th Circuit is in accord with the decisions of this Court, *Palmer* v. *Hoffman*, 318 U. S. 109, 87 L.ed. 645 (1943); *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801, 93 L.ed. 1704 (1949); and of other courts of appeal, *Magnat Corp.* v. *B & B Electroplating, Inc.*, 358 F. 2d 794 (1st Cir. 1966); *Turner Construction Co.* v. *Houlihan*, 240 F. 2d 435 (1st Cir. 1956); *New York, N. H. & H. Ry.* v. *Zermani*, 200 F. 2d 240 (1st Cir. 1952); *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659 (2nd Cir. 1964); *Ostapenko* v. *American Bridge Div. of U. S. Steel Corp.*, 267 F. 2d 204 (2nd Cir. 1959); *Yoham* v. *Rosecliff Realty Co.*, 267 F. 2d [illegible] (3rd Cir. 1959); *Johnson* v. *Chesapeake & O. Ry.*, 227 F. 2d 858 (7th Cir. 1955); *Willits* v. *Yellow Cab Co.*, 214 F. 2d 612

(7th Cir. 1954); *Massachusetts Bond & Ins. Co.* v. *Dilschneider, Inc.*, 203 F. 2d 556 (8th Cir. 1953); *Capital Transportation Co.* v. *Compton*, 187 F. 2d 844 (8th Cir. 1951); *Hargrave* v. *Wellman*, 276 F. 2d 948 (9th Cir. 1960); *Richfield Oil Corp.* v. *Karseal Corp.*, 271 F. 2d 709 (9th Cir. 1959); *Woodworkers Tool Works* v. *Byrne*, 191 F. 2d 667 (9th Cir. 1951).

The Court of Appeals here "painstakingly reviewed and considered the record" and concluded that petitioners did not "meet the requirements laid down by this Court in the long line of decisions cited above."

It is submitted that that conclusion is correct. The trial court twice invited counsel for petitioners to note their objections so as to comply with Rule 51. First, in chambers when the proposed special interrogatories were discussed the trial court stated:

> "My understanding is that without waiving contentions that have been made throughout the trial or *foreclosing counsel in any way from taking exception to instructions.*"

and, again

> "Subject to *express exception which may be taken prior to the retirement of the jury* to the jury room" (R. 1863, 1864). [Emphasis supplied.]

Again, after completing its instructions to the jury, including submitting the special interrogatories, the court invited counsel to the bench and stated:

> "I would appreciate your making suggestions for clarification and any — just the subject matter of *any basic exception* you might take, so that I might clarify the matter, if necessary, before the jury retires" (R. 1943). [Emphasis supplied.]

The response of counsel for petitioners to these two express invitations is set forth in full by the Court of Appeals as a footnote to its opinion, 380 F. 2d 860, 864. Following that colloquy the trial court made a change in its instructions relating to interrogatory number 4 to meet an objection of petitioners and then the jury retired. Then ensued the following colloquy:

> "THE COURT: You may complete your exceptions, gentlemen. The jury has retired. And I take it you gentlemen stipulate, despite the rule, that we may complete our exceptions in the absence of the jury,
>
> "MR. BEHLE: We do, sir. We are going to surprise you and say we have no exceptions.
>
> "MR. DUNCAN: Except as noted at the bench.
>
> "MR. BEHLE: Except as noted at the bench" (R. 1954).

It is submitted that petitioners' deliberate failure to record their objections, now belatedly raised at the appellate level, fully supports the conclusions of the Court of Appeals and is in accord with established law under Rule 51.

E. *The Court of Appeals ruled correctly on the statute of limitations issue in accordance with decisions of this Court and other courts of appeal, and its conclusion is in conformity with state decisions under the applicable state statute of limitations.*

The Court of Appeals correctly held that petitioners' claims were barred by the Utah statute of limitations:

(i) *The applicable statute of limitations.* Since neither the federal statute nor Rule 10b-5 on which it is based provide a period of limitation on the cause of action thus created, the state statute of limitations governs the timeliness of this federal cause of action. *International Union* v. *Hoosier Cardinal*

Corp., 383 U. S. 696 (1966). The state statute applicable is the one "applicable to actions of a similar nature," *Campbell* v. *Haverhill*, 155 U. S. 610 (1895). All cases which have specifically considered the question with respect to 10b-5 actions have concluded that the appropriate state statute is the one applicable to a cause of action based on fraud. *Janigan* v. *Taylor*, 344 F. 2d 781 (1st Cir. 1965); *Charney* v. *Thomas*, 372 F. 2d 97 (6th Cir. 1967); *Hooper* v. *Mountain States Sec. Corp.*, 282 F. 2d 195 (5th Cir. 1960); *Errion* v. *Connell*, 236 F. 2d 447 (9th Cir. 1956); *Fratt* v. *Robinson*, 203 F. 2d 627 (9th Cir. 1953); *Turner* v. *Lundquist*, 377 F. 2d 44 (9th Cir. 1967); *Connelly* v. *Balkwill*, 174 F. Supp. 49 (N. D. Ohio 1959); *Glickman* v. *Schweickart & Co.*, 242 F. Supp. 670 (S. D. N. Y. 1965); *Tobacco & Allied Stocks* v. *Transamerica Corp.*, 143 F. Supp. 323 (D. Dela. 1956) aff'd 244 F. 2d 902 (3rd Cir. 1957); *Trussel* v. *United Underwriters Ltd.*, 228 F. Supp. 757 (D. Colo. 1964). The decision of the Court of Appeals in the case at bar is in accord with those decisions.

The Utah statute applicable to fraud actions provides that suit must be commenced within three years after the cause of action shall have accrued for:

> "* * * An action for relief on the ground of fraud or mistake; but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake" (78-12-26(3) Utah Code Annotated 1953).

(ii) *The statute of limitations began to run in August of* 1961. Plaintiff's cause of action accrued on discovery of the "fraud" or the discovery of such facts as would put a person of ordinary intelligence and prudence on inquiry. *Horn* v. *Daniel*, 315 F. 2d 471 (10th Cir. 1962); *Larsen* v. *Utah Loan & Trust Co.*, 23 Utah 449, 65 Pac. 208 (1901); *Gibson* v. *Jensen*, 48 Utah 244, 158 Pac. 426 (1916).

It is petitioners' theory that General Waterworks, in order to induce petitioners to sell their Bear River stock for less than its true worth, misrepresented to petitioners its intent to employ Vincent Chiodo for a period of ten years and its intent to own, operate, develop, and not to sell the Bear River property (R. 1885). The record is clear that at the end of July, 1961 (R. 1452) Vincent Chiodo and his son Don met with Messrs. Sanders and Bell of General Waterworks in Denver and were told at that time of the possibility of a trade of the Bear River property to Mountain States Telephone & Telegraph Company in which event Vincent Chiodo was through as manager (R. 1454). In August 1961, shortly after that conference (R. 1553), Chiodo started selling his General Waterworks stock (R. 963) and wrote (R. 1552) a letter to the REA (Supp. record, R. 7, Ex. B-4(a) which is quoted in our statement of the case, *supra* at 11.

From Chiodo's own conclusions both that he had been "used" by General Waterworks and that the price agreed upon and the inducement to sell were based on false representations as to General Waterworks' intentions, there can be no doubt he was in possession of "all information necessary to discover the [alleged] fraud." *Horn* v. *Daniel, supra.* Such information was sufficient to satisfy the requirements of the Utah statute and the cause of action accrued on that date. *Larsen* v. *Utah Loan & Trust Co., supra, Gibson* v. *Jensen, supra, Taylor* v. *Moore,* 87 Utah 493, 51 P. 2d 222 (1935). Whatever was concealed was now revealed. *Crummer Co.* v. *DuPont,* 255 F. 2d 425 (5th Cir. 1958). As stated by the Fifth Circuit in *Phillips Petroleum Co.* v. *Johnson,* 155 F. 2d 185 (5th Cir. 1946):

> "It is enough for one to know that he has a cause of action, and that representations which before concealed it are not true. A concealment which no longer

conceals a cause of action will not continue to toll the statute, though the full facts may not yet have been disclosed." Accord, *Tobacco and Allied Stocks, Inc.* v. *Transamerica Corp.*, 244 F. 2d 902 (3rd Cir. 1957).

Since this action was not filed until October 2, 1964, more than three years after August 4, 1961, plaintiffs' cause of action is barred by the statute of limitations.

This very argument was made by respondent to the trial court in support of its motion for a directed verdict on the ground the action was barred by the statute of limitations (R. 1812-1814). The court, as authorized by Rule 50, took the motion for a directed verdict under advisement for ruling after the verdict of the jury on the special interrogatories was returned.

In discussing the statute of limitations issue in the conference at chambers prior to the submission of the case to the jury the following ensued:

> "THE COURT: It is also agreed that (and this may be implicit in the foregoing stipulation) the issue of the statute of limitations may be resolved by the court following the return of the special interrogatories.
>
> "While the parties generally feel that this involves solely or primarily an issue of law in view of the record, yet the parties understand and agree that the court as fact finder may resolve any factual problems necessary to the resolution on the statute of limitations."

Counsel for both parties agreed on the record to that stipulation (R. 1864).

Following the entry of the jury's answers to the interrogatories the defendant General Waterworks Corporation moved the court, pursuant to Rules 49, 50 and 58, that judg-

ment be entered in favor of the defendant against the plaintiffs on the jury's answers to the special interrogatories and "the reserved issues of law raised by the defendant's motion for a directed verdict made at the close of all the evidence" (R. 1158). Following that motion the following judgment was entered by the trial court:

> "This action came on for trial before the court and a jury, the Honorable A. Sherman Christensen, District Judge, presiding, defendant having duly made a motion for a directed verdict at the close of all the evidence; the Court having submitted the matter to the jury on special interrogatories, subject to a later determination of the legal questions raised by defendant's motion for a directed verdict; the jury, in accordance with the instructions of the Court, having duly rendered its answers to said interrogatories and its special verdict having been entered and filed; and the Court having been fully advised in the premises.
>
> "IT IS ORDERED AND ADJUDGED that judgment be entered in favor of defendant and against the plaintiffs; that the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendant General Waterworks Corporation recover from the plaintiffs its costs of action in the amount of $....." (R. 1160).

Based on this record the Court of Appeals, as an additional ground for affirmation of the judgment stated:

> "From the wording of the judgment it is apparent that it was rendered on the basis of both the 'motion for a directed verdict' and the answers to the interrogatories. We consider the judgment, as rendered, to sustain General Waterworks' contention as to the statute of limitations and agree with that disposition."

Petitioners argue that the action of the trial court and the Court of Appeals:

> "Denied petitioners their constitutional right of due process of law and a jury trial, contrary to the 5th and 7th amendments to the Constitution of the United States" (Petition, page 36).

No authorities are cited in support of this proposition. Even more important, this constitutional issue was not raised in the Court below. It is well settled that this Court will not consider an issue when the point is first raised by the petition for certiorari. *Vaughan* v. *Atkinson*, 369 U. S. 527 (1962); *Lawn* v. *United States*, 355 U. S. 339 (1958); *Helvering* v. *Minnesota Tea Company*, 296 U. S. 378 (1935).

Furthermore, not only was the decision as to the statute of limitations correct on the merits, but petitioners cannot complain of any denial of constitutional rights because they expressly stipulated to the procedure on which that decision was based (R. 1864). Even in the absence of such a stipulation, petitioners' failure to make a demand for a special interrogatory on the statute of limitations issue brings the provisions of Rule 49 into play. The cases decided under that rule make it clear that under such circumstances the Court's judgment will be deemed to be based on findings of fact in accord with the judgment entered. *Aetna Ins. Co.* v. *Rhodes*, 170 F. 2d 111 (10th Cir. 1948); *Hinshaw* v. *New England Mutual Life Ins. Co.*, 104 F. 2d 45 (8th Cir. 1939); *L'Urbaine et la Seine* v. *Rodriguez*, 268 F. 2d 1 (5th Cir. 1959); *Travelers Insurance Co.* v. *Hernandez*, 276 F. 2d 267 (5th Cir. 1960).

CONCLUSION

It is submitted that the petition for certiorari should be denied on the grounds that: (1) the petition does not present any special or important issue warranting the exercise of this Court's certiorari jurisdiction pursuant to Rule 19, and (2) the decision of the Court of Appeals affirming the judgment below was correct.

Respectfully submitted,

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